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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1958.

No. 944

HERSHEY MFG. CO., AN ILLINOIS CORPORATION,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, INDIVIDUALLY AND AS STATE'S ATTORNEY OF COOK COUNTY; JOSEPH D. LOHMAN, INDIVIDUALLY AND AS SHERIFF OF COOK COUNTY; TIMOTHY J. O'CONNOR, INDIVIDUALLY AND AS COMMISSIONER OF POLICE OF THE CITY OF CHICAGO, WILLIAM G. MILOTA, INDIVIDUALLY AND AS BAILIFF OF THE MUNICIPAL COURT OF CHICAGO; AND LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

OBJECTIONS TO APPLICATION FOR INJUNCTION PENDING FINAL DETERMINATION ON APPEAL.

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County, Illinois.

FRANCIS X. RILEY,
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Counsel for Certain Appellees.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 1959

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court:

Benjamin S. Adamowski, individually and as State's Attorney of Cook County, Illinois, and Joseph D. Lohman, Sheriff of Cook County, Illinois, appellees herein, by their attorney, Benjamin S. Adamowski, respectfully submit that the application of the appellant for injunction pend-

ing the final determination of the cause by the Supreme Court of the United States should be denied for the following reasons:

I.

No injunctive relief should be granted because the federal court lacks original jurisdiction of this action. The statutory requirements of Title 28, U. S. C. A., Section 1331 are not fulfilled because no substantial federal question is presented. This arises from the fact that the federal court must first determine the *non-federal* question as to whether any of the Illinois gambling statutes can be applied to the appellant's slot-machine parts and sub-assemblies—a question which has never been presented and decided by any Illinois court. This fundamental issue has been analyzed in the aforesaid appellees' "Answer to Motion to Vacate," filed in this cause on March 9, 1959. Although it has been transmitted to this Court as part of the record, we attach a copy herewith as Appendix "A" for the convenience of the Court; and we respectfully invite the Court's attention to it.

The extensive interrogation of Mr. Yowell, counsel for appellant, by Judge Campbell and Judge Hoffman during the proceedings of April 14, 1959 leaves no doubt that the majority of the Three-Judge Court was concerned with the question of *original* jurisdiction of the United States District Court. We submit that counsel's own response (Tr. 12) that the federal court must first determine the *non-federal* question of the applicability of the Illinois statute to the appellant's devices—a question heretofore undecided by any Illinois court—determines definitely that the United States District Court does not have original jurisdiction of this action within the purview of Title 28, U. S. C. A., Section 1331.

This has been a paramount issue in this litigation since

it was commenced on July 14, 1958. During the course of the proceedings of July 17, 1958, Judge Perry, sitting as emergency Judge, recognized this issue immediately and urged this appellant to seriously consider an appropriate action in the state court (Tr. 19). During the extensive proceedings of July 25 and July 28, 1958, he stated that the appellees' position was meritorious but that he would defer action to the Three-Judge Court and would take the motion under advisement (Tr. 52, 53, 101). If he alone were deciding the question, he would sustain the appellees (Tr. 41). It was Judge Perry's view that he could make a finding as to jurisdiction for the *limited* purpose of entering the restraining order (Tr. 114).

The decisions in *Doud* v. *Hodge*, 350 U. S. 485 and *Toomer* v. *Witsell*, 334 U. S. 385, are clearly inapplicable.

In *Doud*, the *original* jurisdiction of the United States District Court was never challenged. There were no unresolved questions of state law or of the applicability of the challenged state statute; the situation in the case before the bar is exactly opposite. As a matter of fact, upon questioning by Judge Hoffman during the proceedings of April 14, 1959 (Tr. 43-44), Mr. Yowell practically conceded that this case did not apply.

In *Toomer*, it is clear that there were no unresolved questions of state law except the statute relating to state income taxes. *Toomer* v. *Witsell*, 334 U. S. 385, 392. As to the state income tax statute, this Court held that the District Court did not have jurisdiction to entertain it. *Toomer* v. *Witsell*, 334 U. S. 385, 406.

It would indeed represent a strange anomaly in the law if this Court were to exercise its extraordinary injunctive power and stay the enforcement of state criminal statutes through the vehicle of a lawsuit, which, according to the view of three out of four federal judges, is not within the original jurisdiction of the United States District Court.

II.

Even in cases where the original jurisdiction of the United States District Court is present, it is the announced policy of the federal courts not to interfere with the enforcement of state criminal statutes. This policy is reflected in both judicial decisions and congressional enactments, which are analyzed in the attached appellees' "Answer to the Motion to Vacate." This policy certainly should prevail where the District Court is without original jurisdiction.

The case at bar emphasizes the wisdom of this policy of non-interference. The enforcement of an Illinois criminal statute was restrained by the federal court from July 28, 1958 to April 14, 1959, when that Court finally determined that it did not have jurisdiction of the cause, and therefore no jurisdiction to restrain the Illinois officers. This policy against federal intervention is peculiarly applicable here where non-federal questions remain unresolved by any Illinois court.

III.

In addition to the want of original jurisdiction, the appellant is not entitled to any injunctive relief because it has an adequate remedy at law. These are clearly itemized in the trial court's Memorandum and Order of February 9, 1959.

Questions of the applicability of any Illinois gambling statute to the plaintiff's slot-machine parts and subassemblies and to the constitutionality of the challenged act can be raised and determined in the following proceedings: (1) the hearing before a judge, justice or court to determine the disposition of seized property (chap. 38, Sec. 697, Ill. Rev. Stats.); (2) replevin (chap. 119, Sections 1 *et seq.*, Ill. Rev. Stats.); (3) declaratory judgment (chap. 110,

Sec. 57.1, Ill. Rev. Stats.); (4) an action for damages if the property is destroyed, *Lawton* v. *Steele*, 152 U. S. 133.

IV.

The appellant's instant Application for Injunction does not present a complete picture of the facts.

In Point III, which is found at page 4 of its Application, the appellant weaves several clauses, taken out of context from the trial court's majority Memorandum and Order. This paragraph may well create the impression that the Memorandum and Order is self contradictory and that the conclusion of the majority is not supported by its reasoning.

The majority did not categorically state that "the single statute challenged in this complaint would seem to violate the due process clause of the Fourteenth Amendment of the United States Constitution". The exact words of the majority, which convey an entirely different meaning, are found at page 5 of its Memorandum and Order:

> "This Court cannot assume jurisdiction of this case because the single statute challenged in this complaint may seem to violate the due process clause of the 14th Amendment of the United States Constitution."

The majority of the trial court did not expressly find that the complaint presents a substantial federal question "for a single district judge". At page 4 of its Memorandum and Order, the majority said that the airport phase of the litigation *might* be a matter for a single federal judge.

The appellant fails to note that the majority's decision also turned on the fact that a federal court will not exercise its jurisdiction but will dismiss a complaint "which asks a decision on the merits concerning unresolved questions of State law and questions of Constitutional law never before decided by the State Supreme Court".

The appellant's reliance upon *Doud* v. *Hodge*, 350 U. S.

485, and *Toomer* v. *Witsell*, 334 U. S. 385 has been discussed elsewhere. Those cases do not conflict with the case before the bar. We respectfully submit that they are clearly inapplicable.

At the top of page 5 of the instant Application, the appellant states that it "manufactures only parts and subassemblies of slot machines intended for shipment to Nevada where the assembly and use of slot machines is lawful, and to foreign countries, etc." This is not a full and complete disclosure and may well convey the impression that it manufactures only parts and that the merchandise is shipped only to Nevada or foreign countries. During the proceedings of July 25 and July 28, 1958, the secretary of the appellant corporation testified that it sold to exclusive distributors in other *states* and that it had a distributor in the State of Illinois to whom it sold. He further testified that the appellant corporation manufactured all parts for a slot machine (Tr. 95-96). This is borne out by the purchase orders which constitute appendix "B" of the instant Application. It appears that appellant's customers order complete machines and not parts.

The police action of April 15, 1959, referred to at page 6, was proper, Rule 62(a) and 62(c), Federal Rules of Civil Procedure. The appellant has made no showing to the contrary.

The order of May 19, 1959, entered in the Municipal Court of Chicago, in the cause entitled *People of the State of Illinois* v. *Buckley Manufacturing Co.*, a corporation, and *Hubert Buckley*, Nos. 58 MC 36047 and 58 MC 37040, has not become final. It has been assigned to the appellate division of the State's Attorney's office for analysis and review. The appellees deny that, nevertheless, they continue to threaten to enforce said statute against appellant.

V.

This matter was first argued extensively before the emergency judge on July 25 and July 28, 1958. As stated previously, he indicated that the District Court lacked jurisdiction and that the appellant should resort to remedies in the state court.

It was argued again at length before the Three-Judge Court on September 29, 1958 and reconsidered after argument on April 14, 1959. The majority was of the firm view that the Court lacked jurisdiction and that the appellant was entitled to no injunctive relief. Weight should be accorded the views of these judges.

An order granting or denying injunctive relief will not be disturbed by the reviewing court unless the discretion of the lower court was abused and improvidently exercised. *Alabama* v. *United States*, 279 U. S. 229, 231. The appellant has demonstrated no abuse of discretion. It has never met the basic jurisdictional challenge in this case. It has advanced no justification for any judicial departure from the firm federal policy of non-intervention in state criminal matters. It has utterly failed to avoid the fact that Illinois law makes available four separate legal remedies where all issues, non-federal as well as federal, can be adjudicated. Opposed to the current wish of the appellant, we have the studied view and judgment of Judge Campbell, with broad experience of twenty years as a federal District Court Judge and Judge Hoffman with experience as a federal and a state court judge. Orderly administration of justice requires that these views should not be disturbed, except for very extraordinary reasons. No such reasons have been advanced by the appellant.

Moreover, a previous application was made to the Honorable Tom C. Clark, Associate Justice of this Court, who denied the application without qualification on April 24, 1959. Great weight should be accorded that determination. Inasmuch as the previous denial was not made without prejudice, the renewed application should not be favored, Rule 50 (5), Supreme Court Rules.

The instant application has not presented any substantially different or additional reason for injunctive relief. Furthermore, extraordinary equitable relief will not be granted if it may prove useless or inefficient. Even if the appellant prevailed in the instant application, it must face other Illinois statutory enactments. The provisions of Ch. 38, Sections 341-343, Ill. Rev. Stat., also relate to gambling devices. While the Supreme Court of Illinois has not determined whether slot-machine subassemblies and parts fall within the purview of these statutory provisions, strictly and properly a non-federal question, it has, as noted in the majority's Memorandum and Order, decided that gambling devices are not the legal subjects of property and are at all times liable to seizure, forfeiture and destruction without violating any constitutional provisions. Furthermore, this provision had been construed to include the "manufacture" of gambling devices. *The People v. One Device*, 410 Ill. 318, 321-322.

To paraphrase the firm judgment of Judge Campbell, as expressed on February 10, 1959 (Tr. 6-9) and again on April 14, 1959 (Tr. 70-72) there was no basis for granting any restraining order and the protection of the federal court has been extended to the appellant too long and without any authority.

WHEREFORE, the aforesaid appellees respectfully pray that the application of the appellant for an injunction pending the final determination of the cause by the Supreme Court of the United States be denied.

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County, Illinois.

FRANCIS X. RILEY,
EDWARD J. HLADIS,
Assistant State's Attorneys of Cook County, Illinois,
507 County Building,
Chicago 2, Illinois,
Counsel for Certain Appellees.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

HERSHEY MFG. CO., an Illinois Corporation, *Plaintiff*,
vs.
BENJAMIN S. ADAMOWSKI, individually and as State's Attorney of Cook County, *et al.*, *Defendants*.
No. 58-C-1287.

ANSWER TO MOTION TO VACATE AND TO DENY MOTION TO DISMISS

Benjamin S. Adamowski, individually and as State's Attorney of Cook County, and Joseph D. Lohman, Sheriff of Cook County, defendants herein, by their attorney, Benjamin S. Adamowski, respectfully submit that the motion of the plaintiff to vacate the Memorandum and Order, entered February 9, 1959, and upon reconsideration to deny the motion to dismiss, and for other relief, should be overruled for the following reasons:

I.

The complaint does not present a substantial federal question within the original jurisdiction of the United States District Court as required by the provisions of Title 28, U. S. C. A., Section 1331. The defendants have

consistently maintained this jurisdictional attack since the very inception of this lawsuit in July, 1958.

The plaintiff has focused its statutory attack solely upon the provisions of Chap. 38, Sec. 344 *et seq.*, Ill. Rev. Stats. The State of Illinois, however, has also legislated on the same subject matter, namely gambling devices, in Chap. 38, Sections 341-343, Ill. Rev. Stats. The latter provisions, particularly Section 342, have been construed by the Supreme Court of Illinois in *People* v. *One Device*, 410 Ill. 318. That court determined that gambling devices, as defined in Section 342, are not lawful subjects of property. They are not, therefore, within the protection of the law, and their seizure and destruction does not result in a violation of any constitutional provisions. Irrespective of the challenged provisions, namely Chapter 38, Sections 344 *et seq.*, Ill. Rev. Stats., the provisions of Chapter 38, Sections 341-343, Ill. Rev. Stats. still classify the subject matter of this litigation as contraband and deprive it of any status of lawful property. Only lawful property, and not contraband, is protected by the federal constitution. The seizure of such contraband devices does not violate the due process clause of the federal constitution. *Lawton* v. *Steele*, 152 U. S. 133; *Durant* v. *Bennett*, 54 F. 2d 634. Furthermore, such contraband devices cannot find a protective sanctuary in the commerce clause of the federal constitution. *Sligh* v. *Kirkwood*, 237 U. S. 52; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132.

In its complaint, the plaintiff alleges that the provisions of Chapter 38, Sections 344-348, Ill. Rev. Stats., have not been judicially interpreted so as to embrace slot-machine sub-assemblies and parts. In its motion to vacate, the plaintiff repeats the contention and expands it to apply to the provisions of Chapter 38, Sections 341-343. In effect, it is challenging the application of either statute to the subject matter of this litigation. We submit that this contention cannot fortify the plaintiff's position in the United States

District Court. On the contrary, it only serves to emphasize the lack of a substantial federal question in this cause.

If a case can be decided on either of two grounds, one involving a federal question, the other a question of statutory construction or general law, a federal court will decide only the latter. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288. On this basic and traditional principle, this Court must first decide whether the plaintiff's seized devices, namely slot-machine sub-assemblies and parts, fall within the prohibition of any Illinois statute—an issue which has never been determined by the Supreme Court of Illinois. If this issue is decided in the plaintiff's favor, the litigation is terminated and the federal question remains undecided. Though a federal right is pleaded, there is no certainty that it will ever be disputed. A case in this posture, however, is not a controversy arising under the Constitution or laws of the United States of which the District Court has original jurisdiction. The federal right must be an essential element of the plaintiff's cause of action. It must be necessary to the ultimate decision, and the decision must rest upon a construction of that right. The federal right must be the subject of a genuine and present controversy, not merely a possible or conjectural one. The fact that a question of federal law is lurking in the background, awaiting the prior determination of other non-federal issues, is insufficient to support the original jurisdiction of the United States District Court. *Gully* v. *First National Bank in Meridian*, 299 U. S. 109. The plaintiff's pleading on its face presents the question of the application of the Illinois statute to its seized product—a question which is to be determined by Illinois law. Whether this Court will reach the question of federal law is only a matter of conjecture at this stage of proceeding. In view of the foregoing, we submit that the dismissal of this cause was proper. This Court lacks original jurisdiction.

We further submit that any reliance upon the provisions of Title 28, U. S. C. A., Sections 2281 *et seq.*, will not cure the jurisdictional defect in this case. Before a three-judge court has the power to act, the plaintiff must present a controversy within the original jurisdiction of the United States District Court. Original federal jurisdiction may not be presumed. Nor can it be conferred upon the Court by waiver or consent of the parties.

Moreover, the case of *Doud* v. *Hodge*, 350 U. S. 485, cannot be the source of any comfort to the plaintiff in its argument in favor of jurisdiction. In that case, there was no question that the challenged act applied to the plaintiff in his business. *Doud* v. *Hodge*, 127 Fed. Supp. 853, 856. The act which regulated a lawful business had been interpreted by the Supreme Court of Illinois, and this was recognized by the federal courts. *Doud* v. *Hodge*, 127 Fed. Supp. 853; *Doud* v. *Hodge*, 146 Fed. Supp. 887, 891; *Morey* v. *Doud*, 354 U. S. 457. The only question for judicial determination was the federal constitutional issue. All preliminary issues of state law had been resolved.

The situation in the case before the bar is exactly the opposite. The challenged act is a criminal statute in the strictest sense of the term, which has never been interpreted by the Supreme Court of Illinois. It relates to contraband, not lawful property. Whether any of the Illinois gambling statutes apply to the plaintiff's seized devices is yet to be determined by the Supreme Court of Illinois. This question of state law must be resolved before any court can consider any federal rights. Such questions of statutory meaning and application are properly the business of a state court.

II.

If we assume, *arguendo*, that there is original federal jurisdiction in this cause, we submit that the doctrine of "discretionary abstention" in properly applicable in this action. In view of the dualism of sovereignty in the United States, it is the announced policy of the federal courts not to interfere with the enforcement of state criminal statutes. *Watson* v. *Buck*, 313 U. S. 387; *Douglas* v. *Jeanette*, 319 U. S. 157; *Stefanelli* v. *Menard*, 342 U. S. 117.

Congress has always been conscious of the sensitive relationship between the federal government and the several states. By its legislation, it has sought to prevent any conflict by refusing to vest the federal courts with jurisdiction over vital state matters until all methods of state relief have been exhausted.

The underlying philosophy of the three-judge court provisions is the prevention of improvident interference with state government and possible conflict between the federal and state authority. *Phillips* v. *U. S.*, 312 U. S. 246. State court proceedings shall not be stayed by a federal court except as expressly authorized by an Act of Congress. Title 28, U. S. C. A., Section 2283. A federal court is not empowered to examine the validity of a state court conviction until all available state remedies have been exhausted. Title 28, U. S. C. A., Section 2254. The federal courts have no jurisdiction to interfere with matters of state revenue where the state affords a speedy and efficient remedy. Title 28, U. S. C. A., Section 1341. The federal court is empowered to interfere with rate orders of state agencies only under limited circumstances. Title 28, U. S. C. A., Section 1342.

This policy of caution and abstention is peculiarly applicable to the instant case where neither the challenged criminal statute has ever been interpreted by the Supreme

Court of Illinois, nor the question of the applicability of any Illinois gambling statute to the plaintiff's products has ever been determined by that court. *Fenner* v. *Boykin*, 271 U. S. 240; *Essman* v. *Hood*, 45 F. 2d 881, 883.

III.

If this court has original jurisdiction and the doctrine of "discretionary abstention" is not applicable, the plaintiff is not entitled to any equitable relief because it has an adequate remedy at law. These are clearly itemized in the Memorandum and Order of February 9, 1959.

Questions of the applicability of any Illinois gambling statute to the plaintiff's devices and to the constitutionality of the challenged act can be raised and determined in the following proceedings: (1) the hearing before a judge, justice or court to determine the disposition of seized property (Chap. 38, Sec. 697, Ill. Rev. Stats.); (2) replevin (Chap. 119, Sections 1 *et seq.*, Ill. Rev. Stats.); (3) declaratory judgment (Chap. 110, Sec. 57.1, Ill. Rev. Stats.); (4) an action for damages if the property is destroyed. *Lawton* v. *Steele*, 152 U. S. 133.

Plaintiff's concern over a series of replevin suits is unfounded. If it should prevail in any of its claims during the course of any of the aforesaid legal actions, it could thereafter obtain proper equitable relief against further and continued seizures if such should occur.

These suggestions of the plaintiff that the opinion of the majority of this court insofar as it itemizes the adequate remedies at law constitutes a determination on the merits without a hearing and supporting findings of fact is without merit. No evidence and resulting findings of fact are required in questions of this type. They are a matter of state law of which the federal court will take judicial notice. *Bowen* v. *Johnston*, 306 U. S. 19, 23; *Laubenheimer* v. *Factor*, 61 Fed. 2d 626, 630.

WHEREFORE, the aforesaid defendants respectfully pray that the motion of the plaintiff to vacate and upon reconsideration to deny the motion to dismiss be overruled and that the Motion and Order of this court entered on February 9, 1959, be reaffirmed.

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County, Illinois.

By: EDWARD J. HLADIS,
Assistant State's Attorney.